89-371

No. _____

In The

Supreme Court of the United States

October Term, 1989

AMERICAN STEAMSHIP COMPANY,
Petitioner,

vs

ALI MUSLEH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDICES –

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QUESTION PRESENTED FOR REVIEW

MAY A JURY AWARD STAND WHICH DOES NOT CONFORM TO THE ADMITTED PROOFS AND WHICH IS BASED ON SPECULATION, PREJUDICE AND SYMPATHY?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is American Steamship Company, a New York corporation. Petitioner is a wholly-owned subsidiary of GATX Corporation, a New York Corporation.

Respondent is Ali Musleh.

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vs

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, American Steamship Company, respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in its case.

OPINIONS AND ORDERS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit (decided June 23, 1989), affirming the judgment entered in the District Court, is attached as Appendix A. The order denying the motion for judgment notwithstanding the verdict (February 2, 1988) is attached as Appendix B. The judgment of the District Court (October 5, 1987) is attached as Appendix C.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on June 23, 1989. This

petition for certiorari is within ninety (90) days of that day. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the following statute which is set out verbatim in Appendix E. 46 U.S.C. § 688.

STATEMENT OF THE CASE

(References in parentheses are to district court docket entries, trial transcripts and trial exhibits)

On October 21, 1985, Respondent, Ali Musleh, was serving as the second cook aboard the M/V ADAM E. CORNELIUS, a vessel owned and operated by Petitioner, American Steamship Company. Respondent first boarded the ADAM E. CORNELIUS on October 17 and continued working in this capacity to October 25, 1985 (Musleh Vol. II, TR 12: Plaintiff's Ex. 3). Since Respondent did not have enough seniority to hold a permanent position with Petitioner, Respondent was forced to leave the vessel on October 25, when he was "bumped" by an individual with more seniority (Defendant's Ex.'s 3 and 15: Musleh Vol. II, TR 58; Gasco Vol. III, TR 20, 31; Anderson Vol. IV, TR 30, 31).

At the time Respondent boarded the vessel, it was berthed in Toledo, Ohio, getting ready to start sailing. Part of the responsibility of the crew in "fit out" involves the taking on of "stores" which included food items (Gasco Vol. III, TR 30, 31: McCabe Vol. III, TR 72, 73).

Goods are brought onto the vessel from the dock via a basket and crane. Once on the vessel, they are taken to various parts of the vessel for storage. Food items are taken to just outside the galley by members of the deck department. It is then the responsibility of the galley personnel, of which Respondent was a member, to place the food items in their proper place (Musleh Vol. II, TR 52, 65; Gasco Vol. III, TR 37; McCabe Vol. III, TR 74, 106). Among the items being brought onto the vessel, were gallons of milk which were kept in plastic milk crates (9½ gallons in a crate: the plastic crate being 13" × 13" (Gasco Vol. III, TR 33: Defendant's Ex. 1)).

As food goods were being transferred unto the ship, they were stacked outside the galley door. In an attempt to clear the walkway, Peter McCabe, a deckhand on the vessel, began moving the items (McCabe Vol. II, TR 71, 76). Brendan Murphy, a porter assigned to the galley of the vessel, asked Mr. McCabe to slide the milk crates to him (a distance of approximately 7-12 feet). Mr. Murphy was, at that time, working with Mr. Musleh in storing the milk in the refrigerator (Murphy Dp. 4, 7-9). It was the third crate so slid which struck the Respondent (McCabe Vol. III, TR 77).

Following the incident, Respondent sought medical care at St. Vincent's Hospital. He was returned to the vessel fit for duty (Plaintiff's Ex. 9) and continued working until October 25, 1985, when the vessel arrived in Chicago, Illinois. There Respondent was relieved of his job by an individual with more seniority (Gasco Vol. III, TR 40, 41).

FEDERAL JURISDICTION IN UNITED STATES DISTRICT COURT

Federal jurisdiction in the court of first instance was invoked by Respondent under 46 U.S.C. § 688 (Jones Act) and the General Admiralty and Maritime Law.

REASONS FOR ALLOWANCE OF WRIT

Damages are not to be presumed nor may they be based on speculation. Respondent in his case had the burden of proving not only the liability of the Petitioner, but also the facts which support his claim for damages. See *Pizani* v. *M/V COTTON BLOSSOM*, 669 F.2d 1084, 1088 (5th Cir. 1982); *Taliferro* v. *Augie*, 757 F.2d 157, 162 (7th Cir. 1985).

While it is for the jury to determine damages in a civil suit, it is for the court to insure that the verdict comports with the law. *Curtis Publishing Co.* v. *Butts*, 351 F.2d 702, 718 (5th Cir. 1965), *aff'd.*, 388 U.S. 130 (1967). Thus, the power of the jury to fix damages is not unlimited. Damages must be reasonable: they may not be based on speculation, prejudice or passion. *Minneapolis St. P & S. Ste. M. Ry.* v. *Moquin*, 283 U.S. 520, 521, 51 S.Ct. 501, 50 (1931).

Even though a verdict may be supported by substantial evidence, the verdict must be set aside if it is against the clear weight of the evidence or will result in a miscarriage of justice. *Gill* v. *Rollins Protective Services Co.*, 773 F.2d 592, 595 (4th Cir. 1985), *mod.*, 788 F.2d 1042 (1986).

There must thus be some relationship between the award and the claim made. *Betancourt* v. *J.C. Penney Co.*, 554 F.2d 1206 (1st Cir. 1977). In order to determine the propriety of the verdict, the court should look at the nature and extent of the injuries, expenses incurred, suffering, diminution of earning capacity, permanency of the injury and awards in similar cases. *Thompson* v. *National R.R. Passenger Corp.*, 621 F.2d 814 (6th Cir. 1980), *cert. denied*, 449 U.S. 1035 (1980). We will discuss these items *seratim*.

A. Nature And Extent Of Injury

Shortly after the accident, the Respondent sought medical care at St. Vincent's Hospital in Toledo, Ohio, where he had "mild" complaints of pain in the lower leg (Plaintiff's Ex. 9). Respondent was found fit to return to work and continued working on the vessel until October 25, 1985 (Plaintiff's Ex. 15).

After the vessel left the docks in Toledo, Ohio (where the injury occurred). It made two stops en route to Chicago, Illinois. At no time did Respondent make any complaints to ship's officers about his injuries, request to leave the vessel or seek any further medical attention (Gasco Vol. III, TR 40; Anderson Vol. IV, TR 5, 26).

At the time of trial, medical testimony was presented from four physicians: Daniel Schechter, M.D.; Emmanuel Obianwu, M.D.; Adnan Matta, M.D.; and Steven Newman, M.D.

During Dr. Obianwu's treatment of the Respondent a number of tests were performed. These included straight leg raising tests which were equivocal (*id.*, 9, 17); x-rays and an EMG which were within normal limits (*id.*, 11); a range of motion study of the back which noted some

limitation (*id.*, 9); Mr. Musleh's reflexes were normal and there was no sign of atrophy (*id.*, 36). There was, however, signs of muscle spasm and tenderness (*id.*, 10, 11).

Dr. Matta saw the Respondent 57 times beginning on October 25, 1985 (Matta Dp. 38). Dr. Matta testified that he examined Mr. Musleh approximately every second or third visit (*id.*, 35). Dr. Matta noted the following findings as a result of his examinations: tenderness on October 25, 1985 and April 14, 1986; stiffness in back on December 16, 1985, January 2, 1986; decrease in sensation on December 30, 1985; limping on January 28, 1986 and in May, 1987; and spasm March 5, 1986 (Matta Dp. 39-42). Only Dr. Matta described these "findings" as objective. Other physicians testified that complaints of tenderness were subjective.

Dr. Newman saw Mr. Musleh on January 27, 1986 and May 5, 1987, at the request of Respondent's counsel (Newman Dp. 10). Dr. Newman noted that his diagnoses was a sprain and nerve root irritation (*id.*, 23, 34).[1]

Dr. Schechter saw Respondent on June 18, 1986 and quite simply found nothing wrong with him.

Clearly this case dealt with a soft tissue back injury. There was no claim or assertion that Respondent was impaired from all gainful employment.

Respondent's main disability, if any, was pain. The jury obviously gave little weight to his claim of pain, awarding Respondent $8,000.00 for pain and suffering.

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[1] It is interesting to note that despite Respondent's continuous complaints of pain on almost any movement, he had no complaints of pain in his back when he went to the Dearborn Medical Center in February 1986 to obtain treatment on his right foot (Defendant's Ex. 6: Musleh Vol. II, TR 86-87).

B. Diminution Of Earning Capacity

In order to establish his economic claim, Respondent first was required to establish what his stream of income would have been but for the injury. The relevant "stream of income" would be Respondent's after-tax wages. *Jones & Laughlin Steel Corp.* v. *Pfiefer*, 462 U.S. 523, 536; 103 S.Ct. 2541, 2550 (1983). Thus, in determining "net income", amounts paid by the Respondent in federal and state taxes as well as payments to social security must be deducted from his gross pay. *Madore* v. *Ingram Tank Ships, Inc.*, 732 F.2d 475, 479 (5th Cir. 1984).

Once having determined the "stream of income" the same must be discounted to present value. *Pfiefer*, 462 U.S. at 537; 103 S.Ct. at 2550.

Without evidence of inflation or how to adjust for present value, a jury instructed to make such calculation, as this jury was, might well lead it to an award based on sheer speculation. *Aldridge* v. *Baltimore and Ohio R.R. Co.*, 789 F.2d 1061 (4th Cir. 1986).

At the time of the accident, Respondent was 53 years old, having worked with the Petitioner since 1968 (Musleh Vol. I, TR 53: Plaintiff's Ex. 5). Respondent's employment record established (a fact Respondent admitted) that he periodically quit his employment to return to Yemen where his wife and children resided (Musleh Vol. II, TR 43). A review of Exhibit 5 notes Respondent took a 16-month leave of absence in '76/'78 and a 22-month absence in '82/'84.

Respondent's Exhibit 3 established the following gross earnings for the period between 1980 and 1985:

1980 - $15,102
1981 - $24,087
1982 - $17,974

1983 - -0-
1984 - $ 3,827
1985 - $10,892

Respondent's 1985 Income Tax Return set forth earnings from three employers plus vacation benefits totalling $32,281.00. The return also notes federal income tax of $3,589.00 and social security payment of $2,290.45. There was no indication of the amount of state income tax paid.

There was no testimony that Respondent was disabled from all means of employment. Quite the contrary, Dr. Obianwu specifically refuted this contention (Obianwu Dp. 44). In fact, apart from Dr. Newman, there was little testimony regarding Mr. Musleh's ability to work (Dr. Schechter categorically stated that in his opinion Respondent was "feigning his injury" (Schechter Dp. 15)). Further, no evidence was introduced regarding any past or future medical bills.

No expert testimony was introduced regarding the Respondent's lost wages (past or future) or any adjustment the jury could or should make for inflation or reduction to present value. Respondent's only evidence regarding his economic loss was the introduction of his 1985 income tax return and Respondent's payroll record from this Petitioner.

During his closing argument, however, counsel for Respondent referred to the "normal" retirement age as being "65" (*id.* at TR 27). No testimony was elicited on this point. Quite the contrary, while life expectancy has gone up, the *Statistical Abstract of the United States* for 1988 shows that the number of people between the age of 55 to 65 in the work force has steadily decreased and will continue to do so to 1995 (R. 33, Ex. A).

Respondent referred to the fact that "wages are going up" (*id.* at TR 28). No testimony was elicited on this subject. The statistical abstract (R. 44, Ex. A) and the union contract applicable to the Respondent (which was not introduced) are again to the contrary of this position.[2]

Counsel also referred to an inflation factor of five (5%) percent (*id.* at TR 27) and between seven (7%) percent and fifteen (15%) percent (*id.* at TR 28). Again, nowhere in the record is there any support for any of these figures. They were simply pulled out of the air and presented to the jury as a viable means for determining future damages.

Based on minimal evidence regarding economic damages and counsel's improper argument, the jury arrived at the conclusion that Respondent had suffered a

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[2] In *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971), the Court of Appeals for the Sixth Circuit held that it was error in determining the loss of the plaintiff's earning capacity to have added to the established earnings of the plaintiff an annual increase of four (4%) percent representing an increase in productivity and inflation where it was shown that the plaintiff's employment was subject to a collective bargaining agreement. The Court went on to hold that generalized projections of an economist must yield to the uncontradicted facts of a particular case.

In *In Re Air Crash Disaster at New Orleans, Louisiana*, 795 F.2d 1230 (5th Cir. 1986), plaintiff'ts economist was prepared to testify that plaintiff's salary would increase by eight (8%) percent in real terms and that plaintiff would pay only five (5%) percent of his income in taxes over the next 40 years. The Court found both assumptions to be erroneous in both fact and law and concluded "the assumptions of plaintiffs' economist is so abusive of the known facts, and so removed from any area of demonstrated expertise, as to provide no reasonable basis for calculating how much of [plaintiff's] income would have found its way into assets or savings to be inherited by his children. An award for damages 'cannot stand when the only evidence to support it is speculative or purely conjectural.'" *Id.* at 1235.

$192,000.00 economic loss. Such an award is clearly excessive and warrants the granting of a new trial or a remittur.

In determining the "stream of income" in the instant matter, the only real evidence produced were the Respondent's 1985 tax return and his wage record from the Petitioner. Taking these two exhibits, Respondent's average gross earnings were approximately $15,000.00. Extending this income from 1986 to 1998 when Respondent will be 65 years old, the gross lost income is approximately $180,000.00.

This does not end the process for the *Pfiefer* Court recognized that lost wages must be discounted and deal with net wages.

The Court in *Pfiefer* recognized that the discount rate combines earning growth and what one could earn via the investment of a lump-sum award.

If one were to accept the conservative two (2%) percent real interest rate (*i.e.*, inflation minus reduction to present value) as adopted by the Second Circuit Court of Appeals in *Oliveri* v. *Delta Steamship Lines, Inc.*, 849 F.2d 742 (1988), Respondent's gross earnings reduced to present value would be approximately $161,462.00. This again is Respondent's gross earnings. One must assume that Respondent would be paying state and federal taxes as well as social security.

If one were to assume that Respondent would pay three (3%) percent of his gross income in Federal Income Tax (as shown in his '85 return) that would reduce his net loss to $132,500.00. His net loss must be still further reduced to reflect the payment of state taxes. As noted above, in order to correctly determine Respondent's "stream of income" his gross yearly earnings must

be reduced to reflect payments, not only for federal income tax, but state tax and social security tax. Thus, Respondent's gross earnings must be reduced to reflect the 4.6 percent he would have paid in Michigan income tax (M.C.L. § 206.51) and the 7.51 percent he would have paid in social security tax. These deductions would reduce Respondent's lost income to approximately $116,912.00.

Again that assumes he would not obtain any gainful employment until the year 1998. No one testified that Respondent was unemployable physically. In fact, Respondent was found fit for duty and returned to his employment with Petitioner on June 4, 1989 and has worked two months in Petitioner's employ earning on average $120.00 per day.[3]

In *Filkins* v. *McAllister Brothers, Inc.*, 695 F.Supp. 845 (E.D. Va. 1988), plaintiff, a cook on board the defendant's tug, sought recovery for injuries which he alleged occurred when the tug on which he was working came in contact with a barge causing the plaintiff to injure his back. As in the instant matter, plaintiff in *Filkins* was able to continue working for some time following the alleged injury before ever seeking any medical care.

Also, as in the instant matter, there was a real dispute regarding the condition of the plaintiff and the nature of his injury. Filkins' treating physician testified that he

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[3] Assuming *arguendo* that Respondent did obtain gainful employment elsewhere, Respondent should be able to earn as much as he lost. Pursuant to the *Statistical Abstract of the United States* for 1988, an individual employed in retail trade (which includes among other areas, eating and dining establishments, gasoline stations and grocery stores) would earn on average $14,000.00. See tables 645 and 1307. This, of course, assumes that Respondent will seek employment in the United States and not return to his native Yemen.

had a lumbar nerve irritation and that he would have pain if he engaged in heavy lifting, bending, or the like.

In concluding that an award of $180,000.00 to the Respondent was excessive, Judge Kellaman did a thorough analysis of the basis upon which a court may disrupt a jury's award as being excessive. The court emphasized several factors for consideration.

> [t]he court should consider other awards in othes [*sic*] cases, as well as the nature and extent of the injuries, suffering, expenses, diminution of earning capacity, age, expectation of life, permanency and so on. See also *Thompson* v. *National R.R. Passenger Corp.*, 621 F.2d 814 (6th Cir. 1980), *cert. denied*, 449 U.S. 1035 (1980). . . .
>
> If the amount of the verdict is entirely out of proportion to verdicts in similar cases for similar injuries and damages or is so unreasonably high as to result in a miscarriage of justice, the court should set it aside.
>
> * * *
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> While great power is vested in a jury, the right of the jury to fix the amount of damages is not arbitrary or unlimited. Even though there is no specific rule by which damages in cases like this are to be found, they may not be determined by speculation, passion or prejudice . . . "no verdict should be permitted to stand where it is found to be in any degree a result of appeals to passion and prejudice." (citations omitted) *Id.* at 850, 851.
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> * * *
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> In its supervision over the verdicts of the jury, if the court finds that the amount awarded is so great as to shock the conscience of the court and

> to create the impression that the jury has been motivated by passion or prejudice, or has misconceived or misconstrued the facts or the law, or if the award is so out of proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision, the court should step in and correct it. (citations omitted)
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> * * *
>
> It has been the practice, supported by considerable decisions, that the amount to be awarded to an injured person is vested in the fact finder, usually the jury. But, "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from . . . attack [and] [t]he need to be open to reassessment of ancient practices other than those explicitly mandated . . . ." *Williams* v. *Illinois*, 399 U.S. 235, 239-40 (1970). Nor does it relieve or justify this court from the performance of its duty to exercise proper control over verdicts as "new cases expose old infirmities which apathy or absence of challenge have permitted to stand." *Williams*, 399 U.S. at 245. *Id.* at 852, 853.

In setting aside the award, the court, relying on the case of *Johnson* v. *Parrish*, 827 F.2d 988 (4th Cir. 1987) and *Swentek* v. *USAIR, Inc.*, 830 F.2d 552 (4th Cir. 1987), concluded that: where there is little evidence of any sums due for medical expenses, lost wages, or loss of future employment; where the record is void of any evidence of the Respondent's hourly or monthly earnings and the lessening of any earning capacity; and, where there is no evidence that the Respondent was unemployable, the award of $180,000.00 was clearly excessive and warranted the granting of a new trial.

In its analysis, the *Filkins* Court recognized that determining whether a verdict is adequate or excessive is not "easy". While each case must be judged on its own facts, prior awards may be reviewed to help determine whether an award is excessive, inadequate or within the range of usual verdicts in similar cases.

Attached as Appendix D are excerpts from the *Michigan Trial Reporter* for February to October 1988. The *Michigan Trial Reporter* is an index of all Michigan circuit court jury trials in the eight counties surrounding Detroit, Michigan. Appendix D evidence verdicts in cases involving back injuries. Appendix D demonstrates that in soft tissue back injury cases, "usual verdicts" are approximately $25,000.00[4]

In *Uris* v. *Gurney's Inn Corp.*, 405 F.Supp. 744 (E.D.N.Y. 1975), the court granted the defendant's motion for a new trial on the grounds that a jury verdict of $500,000.00 in favor of the plaintiff was grossly excessive. In *Uris*, the plaintiff sustained severe and permanent head injuries as a result of being thrown from a dune buggy manufactured by the defendant.

The plaintiff's damages, as noted via the special verdict entered by the jury, awarded the plaintiff $200,000.00 for pain and suffering to the date of trial, and $300,000.00 for future pain and suffering. In support of her claim for future pain and suffering, medical testimony was presented establishing that there was perma-

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[4] For published opinions evidencing awards where plaintiff claimed back injuries, the Court is directed to: *Monessen Southwestern Ry. Co.* v. *Morgan*, ___ U.S. ___, 108 S.Ct. 1837 (1988); *Wyborski* v. *Bristol City Line of Steamship Ltd.*, 191 F.Supp. 884 (D. Md. 1981); *Hyde* v. *Chevron U.S.A., Inc.*, 697 F.2d 614 (5th Cir. 1983); *Curry* v. *Fluor Drilling Services, Inc.*, 715 F.2d 893 (5th Cir. 1983).

nent scarring of the plaintiff's brain tissue which could cause a convulsive disorder at any time.

After having reviewed all of the testimony presented at the time of trial, the court concluded that the $300,000.00 awarded for future pain and suffering was "so grossly large that it would be a denial of justice to permit it to stand." *Id.* at 746. The *Uris* court, in determining how much of the verdict was excessive, adopted as a guideline the approach set forth in 6A *Moore's Federal Practice*, § 59.0593, which holds the excess to equal "the excess over the amount the court believes a properly functioning jury should have found." *Id.* at 747. The court also took into considerattion the fact that plaintiff's counsel had suggested certain figures to the jury. Finally, the court compared the verdict entered in *Uris* to those entered by other juries in other cases where similar injuries had been claimed and therefore ordered a new trial in the event that the plaintiff did not agree to a substantial remittur of the damages awarded.

In *Schottka* v. *American Export Isbrandsten Lines, Inc.*, 311 F.Supp. 77 (S.D.N.Y. 1969), the court also granted the defendant a new trial on the grounds that the verdict of $50,000.00 entered in favor of the plaintiff was "so grossly excessive as to exceed the recovery which the law will allow." *Id.* at 80. The court thoroughly reviewed the medical testimony presented at trial before reaching the conclusion that the verdict was so grossly excessive as to be illegal and thus, felt a *duty* to set it aside. *Id.* See also *Gaston* v. *Aquaslide "N" Dive Corp.*, 487 F.Supp. 16 (E.D. Tenn. 1980), wherein the court held that an award of $1,250,000.00 to a quadriplegic in a products liability action was excessive and "beyond the maximum limit of a reasonable range"

based on other verdicts arrived at under similar factual situations. *Id.* at 19. In *Gaston*, the court granted a remittur, reducing the award accordingly.

In *Dullard* v. *Berkeley Assoc. Co.*, 606 F.2d 890 (2nd Cir. 1979), a jury awarded the widow of a construction worker $630,000.00 for his wrongful death. In ruling that the damage award was excessive, the court compared the decedent's income at the time of his death with that of income that would be generated from the award,[5] if allowed to stand.

SUMMARY

Respondent's only real evidence addressing his consequential damages were his 1985 income tax returns and wage records from the Petitioner. While it is recognized that the purpose of a trial is not to present a symposium on economics, the injured seaman must be required to prove his damages. Yet in the instant matter, once having presented the above referred to documents, and relying almost exclusively on the '85 return, Respondent argued (prejudicially it is contended) regarding inflation, wage increases, work life expectancy without *any* evidence to support these claims.

If an injured seaman is permitted to establish economic damages with so minimal proofs, the burden will then be placed on the employer to *disprove* an alleged

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[5] The court determined that the $630,000.00 award invested to yield a conservative seven percent annual income would have provided the next of kin an annual income of $44,100.00 without ever touching the principal, as contrasted with the $15,704.00 the decedent was actually earning at the time of his death. 606 F.2d at 895. A contrary ruling is found at *Kokesh* v. *American Steamship Co.*, 747 F.2d 1092 (6th Cir. 1984).

economic loss through the production of economic experts and documentation. This is contrary to the entire premise upon which our civil jury system is based.

Thus, the petition presents several significant issues among them what proofs are necessary to establish one's economic loss, and as the propriety of the award once having presented the proofs.

It must be remembered that Respondent was injured while working with two other crewmen in loading the ship's refrigerator with milk from plastic containers. The operation, in and of itself, was no more hazardous than putting away the family groceries. The Respondent and his fellow workers chose to accomplish this loading by sliding plastic crates filled with milk across the floor towards the refrigerator rather than to lift and carry them in that direction. One of the crates struck the Respondent in the lower leg in the midst of this operation, causing the injuries complained of.

From this insignificant act, the jury arrived at the conclusion that Respondent was entitled to $192,000.00 in economic damages. This despite the fact that no one ever testified that Respondent was disabled from gainful employment.

With such minimal evidence on the damage issue, the jury's award can only be based on confusion, prejudice against Petitioner or sympathy for Respondent any of which would warrant the granting to Petitioner of a new trial.

The decision of the Court of Appeals on this issue, as well as its rulings on the other issues presented in this

petition, if allowed to stand, will have a significant adverse effect not only upon this Petitioner but potentially upon many other Jones Act employers.

For the reasons presented herein, Petitioner prays that this Honorable Court grant its petition for certiorari.

Respectfully submitted,

FOSTER, MEADOWS & BALLARD, P.C.

By: /s/ PAUL D. GALEA (P29250)
Counsel of Record
3200 Penobscot Building
Detroit, Michigan 48226
(313) 961-3234

Attorneys for Petitioner —
AMERICAN STEAMSHIP COMPANY

Dated: August 23, 1989

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

OPINION
NOT FOR PUBLICATION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals – Sixth Circuit)

(Filed June 23, 1989)

(ALI MUSLEH, Plaintiff-Appellant (88-1241), Plaintiff-Appellee (88-1242), v. AMERICAN STEAMSHIP COMPANY, Defendant-Appellee (88-1241), Defendant-Appellant (88-1242) — Nos. 88-1241/42; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: MARTIN and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM.

Ali Musleh ("plaintiff") appeals the district court's jury instruction on comparative negligence in this Jones Act, 46 U.S.C. Sec. 688, claim. American Steamship Company ("defendant") cross-appeals the verdict and requests a new trial. The jury returned a verdict of two hundred thousand dollars ($200,000) for the plain-

tiff reduced 50% for his own comparative negligence. Finding no error in the instructions or other proceedings, we affirm the judgment in favor of the plaintiff for one hundred thousand dollars ($100,000).

I

Plaintiff began working as the second cook aboard the M/V ADAM E. CORNELIUS, a vessel owned and operated by the defendant, on October 17, 1985. Part of the plaintiff's responsibilities included the "fit out," which is the taking on of stores for the journey. This is usually accomplished by bringing goods onto the vessel with a basket, and then storing the goods in the appropriate place on the vessel. Food items are taken to just outside the galley by members of the deck department. It is then the responsibility of the galley personnel, including plaintiff, to place the food items in their proper place.

On October 21, 1985, gallons of milk in plastic milk crates were brought on board the vessel. These crates were stacked outside the galley door. In an attempt to clear the walkway, Peter McCabe, a deckhand on the vessel, began moving the items. Brendan Murphy, a porter assigned to the galley, asked McCabe to slide the milk crates to him. At this time, Murphy was working with the plaintiff by helping him store the milk in the refrigerator. Two crates were slid across the floor without incident. Plaintiff claims that he did not see either of these crates. Plaintiff also testified that it was routine procedure to carry the crates, not to slide them across the floor.

When Murphy slid the third crate, it struck plaintiff in the leg. Murphy acknowledged that he had not signaled

the plaintiff in any way that the crates would be slid across the floor. Following the incident, plaintiff sought medical care at St. Vincent's Hospital. At the hospital, plaintiff was diagnosed with a small hematoma and was told to use an Ace bandage and ice the area for forty-eight hours and soak or heat the area four times a day thereafter. He was returned to the vessel fit for duty and continued working until October 25, 1985, when the vessel arrived in Chicago, Illinois, and plaintiff was relieved of his duties by someone with more seniority. Since leaving the vessel on October 25, 1985, plaintiff has sought medical care from several physicians in relation to his injury.

Plaintiff commenced this action on March 12, 1986, alleging negligence on the part of American Steamship Company. American Steamship's answer pleaded the affirmative defense of comparative negligence. During the trial, evidence was given concerning the location of all involved parties during the incident, the plaintiff's knowledge of the events surrounding the incident, and plaintiff's previous earnings history. In 1985, plaintiff's gross earnings were $33,381. $10,892.96 of this amount was made with the defendant. From 1981 until 1984, plaintiff's annual salary with the defendant ranged between $6,827.56 and $24,087. The lower earnings generally correspond to the years in which plaintiff went to Yemen for extended periods of time.

At the close of the proofs, plaintiff requested that the district court not give any instruction regarding contributory or comparative negligence, claiming that there was no evidence to support this instruction. The district court denied this motion and instructed the jury on comparative negligence. A verdict was returned for the plaintiff on October 5, 1987, in the amount of $200,000 with

a fifty per cent comparative negligence assessment. Defendant filed a Motion for Judgment NOV, a New Trial or Remittitur, which was denied on February 2, 1988. This appeal followed.

II

Each party has one main issue on appeal. Plaintiff objects to the jury instruction regarding comparative negligence while the defendant primarily contends that the verdict was clearly excessive and should be set aside.[1]

A

Plaintiff contends that the district court should not have given a jury instruction regarding comparative negligence or conversely should have set aside the jury's reduction based on a finding of comparative negligence because he claims that the evidence is insufficient to support a comparative negligence theory as opposed to an assumption of the risk theory.

A defendant is entitled to a contributory negligence (or comparative negligence) instruction if there is any evidence to support the theory; however, giving one where not warranted is reversible error. *Birchem* v. *Burlington Northern R. Co.*, 812 F.2d 1047, 1049 (8th Cir. 1987). Thus, in Jones Act (46 U.S.C., Sec. 688) cases, a "contributory negligence" instruction is not to be given if the

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[1] In its brief, American Steamship Company also contends that the district court improperly allowed evidence of subsequent remedial action, that plaintiff's attorney presented improper closing argument, that the jury instruction regarding plaintiff's "slight duty of care" was erroneous, and that the verdict was inconsistent. We find the objections either not well taken or not so harmful as to require a new trial.

facts really suggest an "assumption of the risk." *Hall* v. *American S.S. Co.*, 688 F.2d 1062, 1065 (6th Cir. 1982).

For the purposes of this rule, "assumption of the risk" means proceeding in an unsafe area of the ship when there is no other alternative open to the seaman. *Id.* at 1065-66 (quoting *Tolar* v. *Kinsman Marine Transit Co.*, 618 F.2d 1193, 1195 (6th Cir. 1980)). Furthermore, a seaman is not contributorily negligent simply because he fails to report a dangerous condition, if doing so would otherwise cause the seaman difficulty or be unavailing. *Rivera* v. *Farrell Lines, Inc.*, 474 F.2d 255, 258 (2nd Cir. 1973).

In *Burden* v. *Evansville Materials, Inc.*, 840 F.2d 343 (6th Cir. 1988), this court held that a man who had injured his back while lifting heavy cables on a ship could be contributorily negligent because he had realistic safe alternatives available and he chose the alternative which led to his injury. This court noted that the seaman was in a dangerous position but found that one of the alternatives (carrying the cables with a partner) was safer than the alternative chosen by the seaman of lifting the cables by himself. This court paid particular attention to the fact that the seaman could have requested help without any negative reaction from the management of the ship. This is in direct contrast to the kitchen worker in *Rivera* who could not request help to alleviate his dangerous condition, a slippery floor, because previous requests by others had been met with rebukes. *See Rivera*, 474 F.2d at 258.

In the present case, the district court did not err in instructing the jury regarding comparative negligence. Although plaintiff insists that the loading of milk cartons was a dangerous condition and thus an "assumption of the risk" under *Hall*, plaintiff has introduced no

evidence that he could not have warned his superiors or requested that the parties cease sliding milk cartons across the floor. Thus the case is similar to *Burden* in which this court decided that the situation could constitute cognizable "contributory negligence" because of the presence of safe alternatives.

Plaintiff counters that he was not even aware that the milk cartons were being slid across the floor, and therefore could not have requested that the parties take other actions. It is clear from the verdict that the jury did not accept this version of the facts. Although in analogous situations under the FELA (the statute upon which the Jones Act is based), a defendant cannot prove contributory negligence by only attacking the credibility of the plaintiff's testimony, *Birchem*, 812 F.2d at 1049-1050 n. 4, this has not occured in the present case. McCabe's testimony concerning the location and actions of the parties at the time of the accident could certainly be interpreted by a reasonable person as indicating that the plaintiff was aware of what was going on and did not take reasonable or proper precautions for his own safety. Thus, the jury instruction regarding comparative negligence was warranted.

B

The defendant contends that this court should order a new trial arguing that the verdict was excessive. Specifically, defendant alleges that the verdict was so out of proportion to the injury as to "shock the conscience."

A court can overturn a jury verdict if it is so outrageous as to shock the conscience and there is no reasonable basis for its size. *Rodgers* v. *GFisher Body Div., G.M.C.*, 739 F.2d 1102, 1106 (6th Cir. 1984) (citations omitted). In the present case, the defendant has not met

this high burden. Although defendant continues to characterize plaintiff's injury as a non-disabling "bump on the leg," the jury, presented with conflicting medical testimony, thought otherwise. Furthermore, if one accepts the version of the facts which support the theory that the plaintiff was disabled from the accident, then the figure arrived at by the jury is not excessively large when plaintiff's earnings record is combined with the number of years he had left to work. The fact that this value was not mitigated by his possible earnings in other areas is not the responsibility of the plaintiff. The burden is on the defendant to show that the plaintiff could have mitigated damages by taking lesser employment. *Jones* v. *Consolidated Rail Corporation*, 800 F.2d 590, 593 (6th Cir. 1986).

This is a classic case of factual disputes which should have been, and were, submitted to a jury. The jury returned its verdict, and neither party has advanced a legal contention sufficient to overturn this verdict. Therefore, the judgment is AFFIRMED.

ISSUED AS MANDATE: July 17, 1989
COSTS: NONE

(Certification Omitted)

APPENDIX B

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR A NEW TRIAL, OR, IN THE ALTERNATIVE, FOR REMITTUR

(United States District Court —
Eastern District of Michigan — Southern Division)

(Session of February 2, 1988)

(ALI A. MUSLEH, Plaintiff, -vs- AMERICAN STEAMSHIP COMPANY, Defendant — Case No: 86 CV 70967 DT; HON: Barbara K. Hackett)

At a session of said Court, held in the U.S. Courthouse, City of Detroit, County of Wayne, State of Michigan, on February 2, 1988.

PRESENT: HONORABLE BARBARA K. HACKETT,
U.S. District Court Judge.

This matter having come before the Court on the Motion of the defendant for a Judgment Notwithstanding the Verdict, for a New Trial or, in the Alternative, for Remittur, oral arguments having been heard, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that defendant's Motion for Judgment Notwithstanding the Verdict, for a New Trial or, in the Alternative, for Remittur, is denied for the reasons set forth on the record at the time of oral argument on the Motion, specifically January 20, 1988.

/s/ BARBARA K. HACKETT
U.S. District Court Judge

Approved as to form:
By: /s/ D. Michael O'Bryan (P30545)
Attorney for Plaintiff

APPENDIX C

JUDGMENT IN A CIVIL CASE

(United States District Court —
Eastern District of Michigan)

(Filed October 8, 1987)

(ALI MUSLEH, v. AMERICAN STEAMSHIP CO. — CASE NUMBER: 86-70967)

☒ *Jury Verdict.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED:

that judgment is entered in favor of plaintiff in the following amounts:

lost wages to the present date:	$32,000.00
future lost wages:	$160,000.00
pain and suffering:	$1,000.00
future noneconomic damages:	$7,000.00

further, the percentage of fault attributed to plaintiff is 50% and the percentage of fault attributed to defendant is 50%, therefore plaintiff recovers a total sum of $100,000.00.

/s/ ROBERT A. MOSSING
Clerk

(By): /ss/ Sara Fische
Deputy Clerk

Date: October 5, 1987

APPENDIX D

MICHIGAN TRIAL REPORTER SUMMARIES

(Wayne County — Circuit Court — Detroit)

AUTO ACCIDENT — HEAD-ON COLLISION

Verdict: $20,000
Date of Verdict: 2/23/88 *Judge:* Marvin R. Stempien
Mediation Result: $12,500 Yanik
Plaintiff's Attorney(s): Howard J. Radner, Detroit (Yanik)
Defendant's Attorney(s): Kenneth C. Merritt, Southfield
Age: 29 *Sex:* M *Insurance Carrier:* Aetna (Duguet)

Facts: Plaintiff Yanik was driving west on two lane 10 Mile Rd. at 3:00 a.m. when his vehicle was struck head-on by Defendant Whitaker who was traveling the opposite direction and had allegedly crossed the center line. Defendant driver and his passenger were both killed in this accident and there were suspicions of alcohol involvement.

Plaintiff alleged the defendant was negligent in crossing the center line and was the proximate cause of his injuries.

Defendant contended that plaintiff's alleged injuries did not constitute a serious impairment of body function.

Alleged Injury: Soft tissue injury to back, right knee, left foot, head and neck.

Expert Witnesses:
Plaintiff: Steven Newman, M.D. — Rehabilitation — Southfield MI
Defendant: Thomas Ditkoff, M.D. — Orthopedic — Southfield MI

Case Caption: Duane M. Yanik and Jon F. Buck v. *Theodore Monolidis, Adm. for John C. Whitaker and Howard Linden, Adm. for Debra A. Duguet*

Case Number: 84-433239-NI

Editor's Note: Defendant Whitaker's estate settled with plaintiff Buck prior to trial for $1500.

(Wayne County — Circuit Court — Detroit)

FALLDOWN — RESIDENCE WALKWAY

Verdict: $30,000
Date of Verdict: 2/10/88 *Judge:* Richard P. Hathaway
Mediation Result: $15,000
Plaintiff's Attorney(s): Sheldon L. Miller, Detroit
Defendant's Attorney(s): Richard T. Haynes, Plymouth
Age: 20's *Sex:* F *Insurance Carrier:* State Farm Ins.

Facts: Plaintiff, a social guest of the defendant, while walking along defendant's flagstone walkway stepped into a depression, slipped and caught herself before falling. Defendant had allegedly placed a rubber mat over a missing piece of the walkway thus creating a depression.

Plaintiff alleged defendant knew that the walkway was defective, failed to warn her of the defect, and was negligent in failing to properly repair the walkway.

Defendant contended there was no defect and if

there was he did not know about it. Defendant also contended that plaintiff had made arrangements to dissolve her business before the accident occurred.

Alleged Injury: Sprained ankle and soft tissue injury to back resulting in the dissolution of plaintiff's window business.

Expert Witnesses:
Plaintiff: None
Defendant: None

Case Caption: Patricia S. Pointek v. *Gerald E. Burton*

Case Number: 84-421327-NO

Editor's Note: Plaintiff's counsel advises that a surprise witness at trial resulted in the defendant not contesting liability. Mediation sanctions were imposed.

(Oakland County — Circuit Court — Pontiac)

PREMISES — SHOTGUN DISCHARGE

Verdict: $300,000 plus mediation sanctions and costs
Date of Verdict: 1/15/88 *Judge:* Steven N. Andrews
Mediation Result: $125,000
Plaintiff Attorney(s): William M. Hatchett, Pontiac
Defendant's Attorney(s): Joseph Sukup, Farmington Hills
Age: 56 *Sex:* M *Insurance Carrier:* N/A

Facts: Plaintiff was one of several social guests at defendant's home where the defendant was hosting a dinner and card party. Alcoholic beverages were consumed. Allegedly the defendant's wife was assaulted by the plaintiff. The defendant went

upstairs and returned with a loaded shotgun. A non-party attempted to restrain the defendant and the shotgun discharged striking the plaintiff in the back.

Plaintiff alleged he was a social invitee of defendant, and that defendant was negligent in the handling of the shotgun.

Defendant contended that it was the negligent interference of the non-party which caused the discharge and the defendant was not negligent.

Alleged Injury: Gun shot wound to back with massive soft tissue destruction exposing but not injuring the spine.

Expert Witnesses:
Plaintiff: N/A
Defendant: N/A

Case Caption: *Robert Spicer* v. *James Fisher*

Case Number: 85-304599-NO

Editor's Note: The plaintiff sued the non-party in a separate action and it was dismissed.

(Wayne County — Circuit Court — Detroit)

PRODUCTS LIABILITY — FALL FROM TRACTOR CAB

Verdict: $953,000 less 25% comparative yielded net verdict of $714,750.
Date of Verdict: 6/24/88 *Judge:* Marvin R. Stempien
Mediation Result: $265,000
Plaintiff's Attorney(s): George T. Fishback, Detroit
Defendant's Attorney(s): Loretta M. Ames, Detroit
Age: 51 *Sex:* M *Insurance Carrier:* Self-insured

Facts: Plaintiff, on two occasions, slipped and fell while exiting a Brigadier Tractor manufactured by the defendant. In both instances the plaintiff had parked too close to a wall to open the cab door far enough to get down without first closing the door. Plaintiff claimed he had to walk to the back of the step (on top of fuel tank), closed the door, then descend using the grab handles, when his foot slipped off the step, causing a three foot fall.

Plaintiff alleged defective design of the ingress/egress system as it placed the fuel tank point so near the egress system that his boots could pick up fuel and become slippery.

Defendant contended: (1) the system was safe as designed; (2) plaintiff did not exit properly (i.e. descend from the cab before closing the door); and (3) plaintiff was contributorily negligent.

Alleged Injury: Soft tissue injury to low back, claimed permanent disability. Plaintiff claimed lost income of $250,000.

Expert Witnesses:

Plaintiff: John Howard — Human Factors/Eng. Design — Dayton OH
Paul Cullis, M.D. — Neurologist — Troy MI

Defendant: Allen Dorris, Ph.D. — Human Factors — Peachtree City GA
Howard Bosscher — Accident Investigator — Grand Rapids

Case Caption: *Ernest Williams* v. *General Motors Corp.*

Case Number: 85-505073-NP

D-6

(Wayne County — Circuit Court — Detroit)

FALLDOWN — DEPARTMENT STORE — HARD CANDY ON FLOOR

Verdict: $20,000 less 40% comparative yielded net verdit of $12,000 against K-Mart only.
Date of Verdict: 7/21/88 *Judge:* Louis F. Simmons, Jr.
Mediation Result: $30,000 K-Mart Corp.
Plaintiff's Attorney(s): John J. Cantarella, Pontiac
Defendant's Attorney(s): Christopher R. Gullen, Troy
Age: 60's *Sex:* F *Insurance Carrier:* Self-insured

Facts: Plaintiff was a business invitee to a Detroit Kresge Store which is a wholly owned subsidiary of Defendant K-Mart Corp. The plaintiff slipped and fell on an alleged unseen piece of hard candy as she walked dpown an aisleway. Defendants Pearson and McGill allegedly stole money from the plaintiff as they helped her up from the floor.

Plaintiff alleged Defendant K-Mart was negligent in failing to keep its aisleway cleared.

Defendant contended that witnesses claimed there was nothing on the floor when the plaintiff slipped and fell. Defendant further contended the plaintiff's herniated disk was a pre-existing condition.

Alleged Injury: Low back soft tissue injury and a herniated disc which radiates pain down one leg; pain and suffering.

Expert Witnesses:
Plaintiff: None
Defendant: None

Case Caption: Rebecca M. Thornton v. *K-Mart Corp., Thomas Pearson and Daryl McGill*

Case Number: 85-526252NO

Editor's Note: Defendants Pearson and McGill were dismissed during the trial for lack of evidence. Case is closed. Judgment has been satisfied.

(Wayne County — Circuit Court — Detroit)

BOATING COLLISION — NIGHT — LAKE ST. CLAIR

Verdict: $10,000
Date of Verdict: 7/13/88 *Judge:* William J. Giovan
Mediation Result: $30,000
Plaintiff's Attorney(s): Richard J. Amberg, Jr., Pontiac
Defendant's Attorney(s): Paul D. Galea, Detroit
Age: 30's *Sex:* M *Insurance Carrier:* N/A

Facts: Plaintiff and Defendant Militello were involved in a nighttime boating collision on Lake St. Clair. The defendant was operating a speedboat owned by Co-Defendant Grippe at approximately 30 m.p.h. when he struck the plaintiff's cruiser broadside causing the plaintiff to fall from the deck and strike his head. The parties denied using alcohol.

Plaintiff alleged: (1) the defendant was operating his boat without lights; (2) his (plaintiff's) boat lights were on; and (3) his injuries caused his dental practice to suffer.

Defendant contended: (1) the plaintiff failed to keep a proper lookout for other boats and was operating his boat without lights; (2) his (defendant's) lights were on; and (3) the plaintiff's claim for lost wages was excessive.

Alleged Injury: Permanent soft tissue injury to back and

property damage to cruiser. Plaintiff claimed $500,000 in lost wages including lost future wages.

Expert Witnesses:

Plaintiff: Thomas Czubiak — Economist — Farmington Hills MI
Ardie Grubaugh — Water Safety — Oscoda MI

Defendant: None

Case Caption: Christopher Ford v. *Mark Militello and Robert Grippe*

Case Number: 85-525814-NO

Editor's Note: Plaintiff's motion for costs was granted. Judgment has been satisfied.

(Ingham County — Circuit Court — Lansing)

AUTO ACCIDENT — REAR END — INTERSECTION

Verdict: $1,800 for Jose only.
Date of Verdict: 9/16/88 *Judge:* Lawrence M. Glazer
Mediation Result: $15,000
Plaintiff's Attorney(s): Stuart J. Dunnings, III, Lansing
Defendant's Attorney(s): Vincent P. Spagnuolo, Lansing
Age: N/A *Sex:* M & F *Insurance Carrier:* N/A

Facts: Plaintiff Jose had stopped his car in the left lane in order to make a left turn and was waiting for oncoming traffic to clear. Defendant was following behind the plaintiff's car and was unable to stop in time to avoid striking the plaintiff's car in the rear. Plaintiff Maria was a front seat passenger in the plaintiff's car.

Plaintiffs alleged that the defendant failed to stop in time to avoid striking the plaintiff's car and that the accident was the proximate cause of Plaintiff Jose's injuries which constituted a serious impairment to a body function.

Defendant contended: (1) he was not negligent; (2) the plaintiff's left turn signal was not activated and he was faced with a sudden emergency; and (3) the plaintiff did not suffer a serious impairment to a body function.

Alleged Injury: Plaintiff Jose - permanent soft tissue injuries to back and neck. Plaintiff claimed three years of lost income. Plaintiff Maria - foot injury.

Expert Witnesses:
Plaintiff: N/A
Defendant: N/A

Case Caption: Jose and Maria Aguilar v. *Daniel Babcock*

Case Number: 83-51275

Editor's Note: Case is closed.

(Oakland County — Circuit Court — Pontiac)

AUTO ACCIDENT — INTERSECTION — THRESHOLD INJURY

Verdict: $12,000
Date of Verdict: 9/88 *Judge:* Gene Schnelz
Mediation Result: $65,000
Plaintiff's Attorney(s): Robert L. Badgley, Bloomfield Hills
Defendant's Attorney(s): Harry A. Meyer, Birmingham
Age: 35 *Sex:* F *Insurance Carrier:* AAA

Facts: Plaintiff was driving through an intersection with a green light when the defendant's vehicle struck her vehicle. The defendant allegedly ran a red light as he was making a left turn. Plaintiff was not taken to a hospital and returned to work after the accident.

Plaintiff alleged that her injuries had reached the threshold and that her damages were sufficient enough to warrant compensation.

Defendant contended that he was not negligent and that the injuries were not sufficient to meet the threshold requirements.

Alleged Injury: Soft tissue injuries, headaches which may last a lifetime, pain and suffering.

Expert Witnesses:

Plaintiff: Paul Cullin, M.D. — Neurologist — Troy MI — LIVE

Defendant: None

Case Caption: *Pamela Kildal* v. *Ronald R. Cobelmish*

Case Number: 87-328315-NI

Editor's Note: Case is closed.

(Kalamazoo County — Circuit Court — Kalamazoo)

AUTO/TRUCK ACCIDENT — LIABILITY ADMITTED

Verdict: $150,000 less 25% for a net verdict of $112,500 plus interest.

Date of Verdict: 10/88 *Judge:* Richard Lamb

Mediation Result: $40,000

Plaintiff's Attorney(s): Sanford L. Steiner, Kalamazoo

Defendant's Attorney(s): Lee C. Patton, Southfield

Age: 37 *Sex:* M *Insurance Carrier:* N/A

Facts: Plaintiff was driving in the left lane of I-94 and a truck owned by Defendant Contract Freightors was being driven in the right lane. The truck ran the plaintiff's car off the road causing the car to spin and strike an abutment. Defendant admitted its driver was negligent and the case proceeded on the issue of comparative negligence and damages.

Plaintiff alleged that the defendant's driver was solely responsible for the accident and the subsequent soft tissue back injury.

Defendant contended that the plaintiff was also driving erratically and that the plaintiff's injuries were not as severe as alleged.

Alleged Injury: Soft tissue injuries to the back leaving plaintiff unable to sit for the long periods necessary to perform his job as a crane operator.

Expert Witnesses:

Plaintiff: Jonathan Hopkins, M.D. — Neurosurgery — Kalamazoo MI

Defendant: P. Wiley, M.D. — Neurologist — Grand Rapids MI

Case Caption: *Paul Winn* v. *Contract Freightors*

Case Number: C86-1746-NI

Editor's Note: Case was settled after trial for $150,000.

(Wayne County — Circuit Court — Detroit)

AUTO ACCIDENT — SUDDEN EMERGENCY

Verdict: $15,000 joint and several.
Date of Verdict: 3/17/88 *Judge:* Richard P. Hathaway
Mediation Result: $10,500
Plaintiff's Attorney(s): David L. Rosenthal, Southfield

Defendant's Attorney(s): Gregory Gromek, Detroit
Age: 21 *Sex:* M *Insurance Carrier:* AAA

Facts: Plaintiff was a passenger in a vehicle along with his brother Co-Defendant Bassim and being driven by another brother Co-Defendant Majid. Co-Defendant Majid claimed he lost control of his vehicle when the tie rods broke, causing him to bounce off the embankment on one side of the freeway, cross traffic and slide into the ditch on the other side.

Plaintiff alleged the defendant driver was negligent in failing to maintain his vehicle and to drive safely according to the road conditions. Plaintiff further alleged his injuries constituted a serious impairment to body function.

Defendant contended they had a sudden emergency and also contended plaintiff did not suffer a serious impairment to body function.

Alleged Injury: Soft tissue injury to back.

Expert Witnesses:
Plaintiff: None
Defendant: Stuart Katz, M.D. — Orthopedic Surgeon — Detroit MI

Case Caption: *Amad Mattia* v. *Majid Mattia and Bassim Mattis d/b/a Shop-Rite Foods*

Case Number: 85-516043-NI

Editor's Note: Judgment has been satisfied.

(Wayne County — Circuit Court — Detroit)

AUTO ACCIDENT — REAR END — LIABILITY ADMITTED

Verdict: $12,500

Date of Verdict: 3/2/88 *Judge:* Kathleen MacDonald
Mediation Result: $4,500
Plaintiff's Attorney(s): Phillip L. Sternberg, Springfield
Defendant's Attorney(s): Richard E. Eaton, Detroit
Age: 30's *Sex:* F *Insurance Carrier:* Allstate Ins.

Facts: Plaintiff's vehicle was rear-ended by defendant's vehicle. Defendant admitted liability and this case was tried on whether the plaintiff sustained a serious impairment to a body function.

Defendant contended the plaintiff did not receive a serious impairment to body function from this accident as her injury was related to a prior injury.

Alleged Injury: Soft tissue injuries to neck and back.

Expert Witnesses:
Plaintiff: None
Defendant: None

Case Caption: *Pearl Knighten* v. *Hubert Allen*

Case Number: 84-416995-NI

Editor's Note: Plaintiff's Motion for Sanctions was granted. Judgment has been satisfied.

(Wayne County — Circuit Court — Detroit)

AUTO ACCIDENT — REAR END — LIABILITY ADMITTED

Verdict: $100,000
Date of Verdict: 5/26/88 *Judge:* Charles S. Farmer
Mediation Result: $21,000
Plaintiff's Attorney(s): Jeffrey A. Winton, Southfield
Defendant's Attorney(s): John C. Brennan, Southfield
Age: 30 *Sex:* M *Insurance Carrier:* Michigan Guarantee Fund

Facts: Plaintiff and defendant were involved in a nighttime accident on the Fischer Freeway near Gratiot in Detroit. Plaintiff had stopped at a red light when defendant's semi-truck struck the rear of his vehicle forcing plaintiff's face to hit the steering wheel.

Defendant admitted negligence in causing the accident and the case was tried on the issue(s) of proximate cause and/or damages.

Alleged Injury: Damage to soft tissue in neck and lower back. Use of a mandibular orthopedic appliance was required eight months after accident when plaintiff developed TMJ.

Expert Witnesses:
Plaintiff: None
Defendant: None

Case Caption: *David L. Moore* v. *Casper Cartage Inc.*

Case Number: 84-430478-NI

Editor's Note: Judgment has been satisfied.

(Wayne County — Circuit Court — Detroit)

INSURANCE — DENIAL OF NO-FAULT BENEFITS

Verdict: $17,300
Date of Verdict: 6/29/88 *Judge:* William J. Giovan
Mediation Result: $22,500
Plaintiff's Attorney(s): Denise L. Mitcham, Detroit
Defendant's Attorney(s): George J. David, Mt. Clemens
Age: 20's *Sex:* F

Facts: Plaintiff was injured in an automobile accident and filed a claim for medical and wage loss expenses with defendant, her insurer. Defendant paid benefits

to the plaintiff for several weeks, and then terminated the benefits after an independent medical evaluation was performed. Plaintiff filed suit when her benefits were discontinued.

Plaintiff alleged she had a valid contract with the defendant and was entitled to the benefits as her injuries were sustained in an automobile accident.

Defendant contended they paid plaintiff benefits until they received an independent medical evaluation. Defendant argued that plaintiff did not suffer an injury as a result of the accident and therefore terminated her benefits.

Alleged Injury: Soft tissue injuries to neck and back.

Expert Witnesses:
Plaintiff: None
Defendant: None

Case Caption: Mary M. Hollen v. *Automobile Club Insurance Association*

Case Number: 84-427243-CK

APPENDIX E

RELEVANT STATUTORY PROVISIONS

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46 U.S.C. § 688 Recovery for injury to or death of a seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for mainte-

nance and cure for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred —

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources — including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person —

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

(2)

No. 89-371

In The

Supreme Court of the United States

October Term, 1989

AMERICAN STEAMSHIP COMPANY,
Petitioner,
vs.
ALI MUSLEH,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDICES –

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COUNTER-QUESTION PRESENTED FOR REVIEW

DOES THE ISSUE PRESENTED BY PETITIONER COMPORT WITH THE REQUIREMENTS OF SUPREME COURT RULE 17.1(a)-(c), INCLUSIVE, SO AS TO JUSTIFY A REVIEW OF LOWER COURT DECISIONS PURSUANT TO A WRIT OF CERTIORARI?

PARTIES TO THE PROCEEDINGS BELOW

Respondent is Ali Musleh.

Petitioner is American Steamship Company, a New York corporation. Petitioner is a wholly-owned subsidiary of GATX Corporation, a New York corporation.

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No. 89-371

In The

Supreme Court of the United States

October Term, 1989

AMERICAN STEAMSHIP COMPANY,

Petitioner,

vs.

ALI MUSLEH,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, Ali Musleh, respectfully requests that a Writ of Certiorari not issue and that the decision of the United States Court of Appeals for the Sixth Circuit be allowed to stand in this case.

OPINIONS AND ORDERS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit (decided June 23, 1989), affirming the judgment entered in the District Court, has already been reproduced as Petitioner's Appendix A. The Order denying the motion for judgment notwithstanding the verdict (February 2, 1988) has already been reproduced as Petitioner's Appendix B. The judgment of the District Court (October 5, 1987) has already been reproduced as Petitioner's Appendix C.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on June 23, 1989. Petitioner states that the Petition for Writ of Certiorari was filed within ninety (90) days of that day. Petitioner invokes jurisdiction of the Supreme Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the following statutes which are set out verbatim in Appendix A:

1) 46 U.S.C. § 688, the Jones Act;

2) 28 U.S.C. § 1916, permitting a seaman to proceed with this Brief in Opposition without prepayment of fees or costs or funishing security therefor under Supreme Court Rule 47.

COUNTER-STATEMENT OF THE CASE

(References in parentheses are to District Court docket entries, trial transcripts and trial exhibits)

Respondent began his sailing career in 1966. He first sailed with the Petitioner in 1968 (Plaintiff's Exhibit 15; hereafter "PE" will denote "Plaintiff's Exhibit").

In 1985, the most recent year to employ as a benchmark for calculating an award for lost future wages, hence the most reasonable benchmark for making such an award, Respondent's gross earnings were $33,281.00 (PE 4). This included $4,874.25 vacation pay (PE 2) and $10,892.96 he earned while in the Petitioner's employ (PE 3). He worked for numerous other maritime employers in 1985 (PE 1).

In 1984, Respondent earned $6,827.56 while employed by the Petitioner; in 1983, $15,102.51; in 1982, $17,974.16; and, in 1981, $24,087.00 (PE 3).

On October 17, 1985, Respondent boarded the Petitioner's vessel for the first time with the rank of second cook (PE 15). Four days later, on October 21, 1985, Respondent suffered his injury (Transcript, September 25, 1987, p. 63; Trial Transcript, consisting of 6 volumes, will be designated hereafter with reference to the date of the transcript volume and page number as follows — "25th, 63"). A second cook's job assignments include putting groceries ("stores") into storage aboard the vessel (25th, 47-48). This activity includes storing milk which comes in ten- to twenty-container crates (Murphy Deposition, p. 5), which are made of plastic or steel (29th, 33). The milk crates weigh between forty and fifty pounds (29th, 63, 80).

Respondent testified that he was injured when a twelve-gallon crate struck him as he was attempting to put the stores away (25th, 51).

The Petitioner's own witness, Brendan P. Murphy, testified that full crates were moved across the galley by either sliding them on the galley floor or by carrying them (Murphy Deposition, p. 7). While Respondent had seen empty crates slid across the floor on other vessels (25th, 101), he had never seen full crates used in this manner (25th, 65). No witnesses contradicted Respondent's testimony on this point.

On the date of Respondent's injury, he, deckhand Peter McCabe, porter Brendan Murphy, and their boss, steward Ron Pokorney (25th, 18), were working in the galley (29th, 27).

Petitioner's Accident Report describes Respondent's accident as follows:

> "Crew member was putting milk (stores coming aboard) in the refer when Peter McCabe slid a full case of milk across the floor and hit Ali A. Musleh in the lower part of his l. leg (calf)." (PE 7)

Respondent testified that the latter method — carrying the crates — described by the Petitioner's witness McCabe, was being used prior to the time he was struck by the sliding crate. Respondent testified that he had told deckhand McCabe to leave the milk crates sitting outside the galley door (29th, 89) and he would carry it across the galley himself when ready (25th, 23, 25, 52). Respondent further testified that he did not see the crate before it struck him (25th, 15) nor did he know it was coming (25th, 23).

The distance between McCabe and Respondent was between seven and twelve feet (25th, 50; 29th, 77). McCabe admitted that he did not shout a warning before he slid the crate across the tile floor or otherwise communicate with Respondent prior to sliding the crate (29th, 88).

Upon being struck hard in the left leg by the crate (25th, 14, 29), Respondent twisted his back (25th, 13, 15, 75-76) and caught himself on the refrigerator ("refer") (25th, 13, 62). Medical records disclose that Respondent suffered severe pain as a result of the back injury which manifested itself several days later.

FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

Federal jurisdiction in the court of first instance was invoked under 46 U.S.C. § 688 (Jones Act) and the General Admiralty and Maritime Laws of the United States under 28 U.S.C. § 1333.

REASONS FOR DISALLOWANCE OF THE WRIT

Supreme Court Rule 17.1(a)-(c), inclusive, specifically addresses the circumstances under which a petitioner may seek review of an appellate decision by means of a Writ of Certiorari. Petitioner's Petition does not comply with said Rule; it merely asks this Court to review a fact dispute which was previously decided by a jury and upheld by two inferior Courts as not being so disproportionate to the testimony presented at trial as to shock the judicial conscience.

A. Non-Compliance With Requirements Of Supreme Court Rule 17.1(a)-(c), Inclusive

Supreme Court Rule 17 provides in relevant part:

> "A review on writ of certiorari is not a matter of right, but of *judicial discretion, and will be granted only when there are special and important reasons therefor.* The following * * * indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; * * * ; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of * * * a federal court of appeals.

> (c) When a * * * federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." [Emphasis supplied].

The standard for review under the above criteria has been discussed in *Fields* v. *United States*, 205 U.S. 292, 27 S.Ct. 543, 51 L.Ed. 807 (1907). The *Fields* Court held that certiorari to review a judgment of the court of appeals, even in a criminal case, will not be granted, however important the issue may be to the petitioner, where it does not involve a question of gravity or of general importance, there is no conflict between state and federal court decisions or between those of federal appeals courts of different circuits, and nothing involved affects international relations.

None of the criteria set forth in Supreme Court Rule 17, and discussed in *Fields*, has been, even remotely, established by the Petitioner. No conflict between the Sixth Circuit Court of Appeals and other federal appellate courts exists with respect to the issues raised and decided in the lower court proceedings; the decision by the Sixth Circuit does not evidence the "far departure from accepted judicial practice" which would warrant this Court's power of supervision. Obviously, a state court decision is not involved. Moreover, the Sixth Circuit decision merely analyzed a fact situation under legal principles which have been previously established by American jurisprudence; it does not conflict with any applicable decisions of this Court.

The Petitioner's framing of the issue merely disguises the true nature of the instant dispute through creative draftsmanship; it is a surreptitious attempt to have this

Court review the facts for a fourth time, having already been fully reviewed below by the jury, District Court and a panel of the Sixth Circuit.

This Court has already decided that jurisdiction to review judgments of federal courts of appeal by certiorari is to be exercised *sparingly* and only in cases of gravity and general importance, or in order to secure uniformity of decisions. *Re Lau Ou Bew*, 141 U.S. 583, 12 S.Ct. 43, 35 L.Ed. 868 (1891); *Re Woods*, 143 U.S. 202, 12 S.Ct. 417, 36 L.Ed. 125 (1892). The issue phrased by the Petitioner is not important to the general public because it has been decided in the affirmative on prior occasions. The Petitioner merely asks that this Court decide whether the Sixth Circuit accurately reviewed the evidence presented at trial to determine if the jury verdict conformed to the proofs. However, a Writ of Certiorari is an impermissible method for obtaining a review of the facts. The Supreme Court shall *not* grant a Writ of Certiorari to review judgments based predominantly on questions of fact. *N. L. R. B.* v. *Waterman's Steamship Corp.*, 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704, *reh. denied*, 309 U.S. 696, 60 S.Ct. 611, 84 L.Ed. 1036 (1940); it will *not* grant a writ to review evidence and discuss specific facts. *United States* v. *Johnson*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925).

The issue raised by the Petitioner may have been one of gravity or general importance when it was first presented in the annals of American jurisprudence; however, since this issue has been laid to rest by past decisions, it can only be concluded that the present Petition seeks a review of the evidence. This is not an appropriate reason for issuance of the Writ.

B. Damage Award Does Not Shock Conscience, Thus Does Not Meet Standard For Review.

The right to a jury trial in a federal court in a civil proceeding is guaranteed by the 7th Amendment of the United States Constitution. The measuring of damages and the amount awarded in an action for personal injuries rests with the discretion of the jury which has the opportunity to listen to the entire testimony, taking into account reasonable inferences and the credibility and demeanor of the witnesses. *Peirce* v. *Van Dusen*, 78 F. 693 (6th Cir., 1920).

Trial courts should be reluctant to interfere with a jury verdict unless the award is deemed excessive on the basis that it does not conform to the evidence. The question of excessiveness is one for the determination of the trial court in the first instance. In the case *sub judice*, the trial court took the opportunity to review the evidence and the jury award via the Petitioner's motion for J.N.O.V., and make the appropriate comparison. The trial court concluded that the award did not substantially exceed any rational appraisal or estimate of the damages.

To interfere with a jury award, the trial court must be convinced that it is so excessive as to shock the judicial conscience; that "the damages are so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous." 22 Am. Jur. 2d, *Damages*, § 1022, pp. 1069-1070. The factors considered when determining whether the jury award was "outrageous" are many and the trial court was in the best position to review the proofs because it had first-hand participation in their presentation. It cannot be said that there was *no* evidence to support the jury award, nor can it be stated with accuracy that the amount proved is *materially* less than the verdict re-

turned. 22 Am. Jur. 2d, *Damages*, § 1023, pp. 1070-1071. If this were the case, the District Court and the Sixth Circuit had the opportunity to overturn the verdict; they chose not to do so.

The District Court's refusal to grant a new trial or a judgment n.o.v. will not be disturbed on appeal unless an abuse of discretion is shown. *Goranson* v. *Kloeb*, 308 F.2d 655 (6th Cir., 1962). The Petitioner did not raise the issue of "abuse of discretion" with the Sixth Circuit and therefore waived the right to do so. The award should not be set aside merely because it is large or because the reviewing court would have awarded less.

The term "abuse of discretion" has been equated with the "clearly erroneous" standard employed in civil appeals, both from final judgments and appealable interlocutory orders. *See, Nicol* v. *Koscinski*, 188 F.2d 537, 538 (6th Cir., 1951). The District Court's decision not to interfere with the collective judgment of the jury (which heard all of the evidence) was not "clearly erroneous." At most, the District Court committed "harmless error."

Throughout its Petition, the Petitioner asks this Court to play a "dangerous game" by comparing damages rendered in other cases with those rendered by the jury in the case *sub judice*, even though the facts adduced at trial in such other cases may be completely different. 22 Am. Jur. 2d, *Damages*, § 1024, pp. 1071-1073. Such an approach is inherently suspect because there is no guarantee that the benchmark jury award, by which all subsequent jury awards must be compared, is accurate. Moreover, such rote comparison removes the need for a jury; merely submit the issues of damages to a computer program which accounts for all jury awards.

The facts, taken as a whole, justify the jury award. Taking into consideration the Respondent's earnings record as a seaman, and his work-life, the damage award was in line with the evidence. The best representation for future lost wages is the most recent year for earnings ($32,281.00). The Petitioner asserts that this is not the appropriate benchmark. The Petitioner itself asks this Court to engage in speculation by suggesting *extraneous* facts which were *not* presented at trial (Petition, p. 11; that Respondent returned to work on June 4, 1989, twenty months *after* the trial ended), or which were fortuitous occurrences which may, or may not, arise in the future (Petition, p. 11, n. 3; Respondent "may return to his native Yemen"). The facts disclose that Respondent had a sailing career which commenced twenty years ago. Moreover, the injury sustained aboard the Petitioner's vessel required repeated visits for proper medical care (Petitioner's Writ, p. 6; 57 times by one physician alone). The evidence presented by Respondent proved that he suffered from a deteriorating physical condition and that he was thereby permanently disabled from working as a seaman (Matta Deposition, pp. 39-41; Obianwu Deposition, pp. 9-11, 14-15, 39; Newman Deposition, pp. 14, 16-17, 24-26, 28-30, 34-42). The Petitioner did not present sufficient rebuttal evidence to prove otherwise. More specifically, the Petitioner did not present one shred of evidence which the jury could use to calculate a different award. The Petitioner simply failed in its burden of proving mitigated damages. *Jones* v. *Consolidated Rail Corp.*, 800 F.2d 590 (6th Cir., 1986). Respondent established that he sustained a permanent reduction in his earning capacity for the rest of his work-life. The age of 65 or 70 is not an outrageous prospect for one's work-life expectancy, irrespective of the conclusions reached by the *Statistical Abstract of the U.S.*, the "Holy Grail" upon which the Petitioner

places heavy reliance, but which it did *not* introduce into evidence. Many people work beyond the "average" age and the jury may recognize this fact. Moreover, the jury is cognizant of the infallibility of economists to predict the future with reasonable certainty. The jurors are acutely aware of the concept of inflation and the reality of rising wages and prices. The whole of their collective experience and knowledge produced a reasonable conclusion. It should not have been, and it was not, disturbed in the lower courts. It should not be disturbed now.

SUMMARY/CONCLUSION

The Petitioner seeks review without substantial justification. No new important issue of great general interest is presented; the issue that the Petitioner raises has already been decided by the judicial system. The lower courts in the case *sub judice* have decided that the jury award did, in fact, conform to the evidence presented at trial. The Petitioner itself seeks speculation to produce a result more favorable to its position; it desires to use the U.S. Supreme Court as the last arbiter of a fact dispute and mold it into a repository for non-constitutional and non-statutory construction. Such issues are best left to the general wisdom of the triers of fact, jury or judge, and to the learned wisdom of intermediate appellate review. The Sixth Circuit stated it best in its mandate (Petitioner's Writ, Appendix A-7):

> "This is a classic case of factual disputes which should have been, and were, submitted to a jury."

For the reasons presented herein, Respondent prays that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDICES TO BRIEF IN OPPOSITION

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APPENDIX A

RELEVANT STATUTORY PROVISIONS

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28 U.S.C. SECTION 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. SECTION 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as a prize.

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28 U.S.C. SECTION 1916

§ 1916. Seamen's suits

In all courts of the United States, seamen may institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security therefor.

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46 U.S.C. SECTION 688

§ 688. Recovery for injury to or death of seaman

(a) **Application of railway employee statutes; jurisdiction.** Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees

shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) **Limitation for certain aliens; applicability in lieu of other remedy.** (1) No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action, if the incident occurred —

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources — including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its terri-

tories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in Article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person —

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

APPENDIX B

SUPREME COURT RULE 17

Rule 17. Considerations governing review on certiorari

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2 The same general considerations outlined above will control in respect of petitions for writs of cer-

tiorari to review judgments of [1] the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

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[1] [*Printer's Note*: Footnote omitted in printing.]